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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM LITTLE ANDERSON,
Plaintiff,
v.
D. DELEON; et al.,
Defendants.

No. C 12-6055 SI (pr)

**ORDER (1) GRANTING PARTIAL
SUMMARY JUDGMENT;
(2) GRANTING MOTION TO
DISMISS; AND (3) REQUIRING
AMENDED COMPLAINT**

INTRODUCTION

William Little Anderson, formerly an inmate at the Correctional Training Facility in Soledad, filed this *pro se* civil rights action under 42 U.S.C. § 1983. Defendants now move for summary judgment for non-exhaustion of administrative remedies and to dismiss the complaint for failure to state a claim upon which relief may be granted. Anderson opposes the motion. For the reasons discussed below, defendants' motion will be granted.

BACKGROUND

A. Allegations In The Complaint

Anderson alleges the following in his complaint:

On December 1, 2011, correctional officer ("C/O") Deleon ordered Anderson to "strip out" for a search. Anderson stripped down to his underwear/boxers, and was then ordered to take those off. Anderson said "he would comply if taken to an appropriate setting to conduct a full scale unclothed body search outside the view of others. D. Deleon then ordered plaintiff to turn around and put his hands on the wall. Plaintiff complied. D. Deleon unreasonably . . . pushed plaintiff's face into the wall, kicked plaintiff's legs apart and forcibly snatched plaintiff's

1 underwear/boxers off without the use of sanitary gloves leaving abrasions/scratches on the right
2 side of plaintiff's buttocks." Docket # 1-1, pp. 4-5. C/O A. Moreno was present and did nothing
3 to stop this.

4 Anderson filed an inmate appeal (also known as a CDC-602). His inmate appeal
5 characterized the incident as "excessive force; . . . sexual assault; abuse/breach of color of
6 authority; employee misconduct right and respects (sic) of others; . . . employee sexual
7 misconduct." Docket # 1-2, p. 5. An investigation was ordered. The investigation ended on
8 December 30, 2011, with a finding "that both involve[d] staff members did violate CDCR's
9 custom/policy with respect to one or more of the allegations." Docket # 1-1, p. 5.¹

10 When Anderson initially notified sergeant Hernandez of the incident on December 1,
11 Hernandez removed Deleon from his assigned post and sent Anderson back to his cell.
12 On December 3, Anderson was interviewed by lieutenant Sandoval, who was sergeant
13 Hernandez's supervisor. Sandoval instructed Anderson to file an inmate appeal and assured that
14 he wouldn't be placed in administrative segregation ("ad-seg") for reporting the incident.

15 Notwithstanding the foregoing assurances, on December 5, 2011, lieutenant A. Mendez
16 wrote a CDC-114D administrative segregation placement notice and had Anderson placed in ad-
17 seg "solely on the predicate for reporting the excessive force sexual assault incident." *Id.* at 6.
18 The CDC-114D stated that he was placed in ad-seg because his presence in general population
19 "jeopardized [the] integrity of an investigation of alleged serious misconduct or criminal
20 activity." Docket # 1-4, p. 2. Anderson remained in ad-seg until June 18, 2012. *See id.* at 17.

21 Anderson's placement and retention in ad-seg were upheld by defendants Benedetti and
22 Spearman during the administrative appeal process. *See* Docket # 1-1, pp. 6-7.

23 On December 15, 2011, M.E. Spearman was designated as the chairperson for Anderson's
24 initial ad-seg ICC classification hearing. Docket # 1-1, p. 14. Anderson asked Spearman to

26 ¹Anderson later provided the report with his opposition to the motion to dismiss. The
27 investigative report's findings of staff misconduct were quite limited, however, and sustained the
28 charge of staff misconduct in only two small respects, i.e., the C/O should not have used
profanity and that the non-urgent search should have been conducted in an area that allowed the
inmate some measure of dignity and self-respect. Docket #35-23 at 6. The report concluded that
the charges of sexual misconduct and excessive force were "not sustained." *Id.*

1 recuse himself "due to retaliatory and conflict of interest issues. Plaintiff's request in the premise
2 was denied." *Id.* Anderson thought Spearman should recuse himself because Anderson had
3 filed a civil rights complaint against Spearman and other prison officials in 2009 while
4 incarcerated at Pleasant Valley State Prison where Spearman was then employed. *See id.* At
5 the classification hearing, prison officials decided to retain Anderson in ad-seg.

6 After completion of the staff complaint investigation, Anderson appeared before the ad-
7 seg ICC for program review. The committee, led by Spearman, considered several transfer
8 options – described in a very confusing way in the complaint – and eventually recommended that
9 Anderson be transferred to Pleasant Valley State Prison. *See id.* at 15-16. Anderson claimed
10 he had safety concerns relating to staff members at that prison. *Id.* at 16.

11 Anderson was subjected to excessive force and inadequate administrative appeals because
12 of the failure to train and failure to adequately staff by defendants Grounds, Spearman, Raso,
13 and Soares. *See id.*

14

15 B. Exhaustion Of Administrative Remedies For The Strip Search

16 The following facts are undisputed unless otherwise noted:

17 Anderson had filed many inmate appeals before the strip search. *See* Docket # 24 at 5-7.

18 On December 3, 2011, two days after the strip search, Anderson filed an inmate appeal
19 about the search. The inmate appeal was assigned appeal number CTF-11-02106.

20 Anderson was interviewed by correctional lieutenant Benedetti on December 6, 2011.
21 He told Benedetti that he had filed an inmate appeal against her on another matter and was
22 displeased with her being assigned as his investigative employee on this matter. Docket # 1-1
23 at 9. He states that he did, however, participate and cooperate in that interview. *Id.*; *cf.* Docket
24 # 1-13 at 6 (August 13, 2012 inmate appeal in which Anderson wrote that the lieutenant
25 "inquired what happened and did appellant have names of any witnesses. Appellant said, 'no'
26 and that the facts of the incident are fully explained in the Staff's Complaint").

27 Prison officials tried to summon Anderson for a second interview on December 17, 2011,
28 but he would not exit his cell to be interviewed. (This is discussed in much more detail below.)

1 Anderson's inmate appeal was partially granted at the first level of review on December
2 30, 2011. The decision stated that the matter had been processed as a staff complaint, a
3 confidential inquiry had been conducted and had concluded that staff did violate CDCR policy
4 with respect to one or more of the issues appealed. Docket # 1-3 at 2-3. The first level decision
5 noted that Anderson had refused to participate in an interview during the investigation of that
6 appeal. *Id.* at 2. The decision also stated that it did not limit or restrict the availability of further
7 review, and that an inmate wishing to appeal the decision had to submit the appeal through all
8 levels of appeal review through the Director's level of review to exhaust administrative remedies.
9 *Id.* at 3.

10 Anderson appealed to the second level. The appeal was cancelled at the second level of
11 review because of Anderson's refusal to interview on December 17 during the first level
12 investigation. Docket # 1-8 at 2 (citing Cal. Code Regs. tit. 15, § 3084.6(a)(5) (erroneous
13 acceptance of inmate appeal at a lower level does not preclude cancellation at the next level of
14 review) and § 3084.6(c)(8) (appeal may be cancelled for refusal to be interviewed)).

15 Anderson attempted to submit the cancelled appeal (i.e., CTF-11-02106) for third level
16 review several times, and it was screened out because he was not authorized to do so.
17 *See* Lozano Decl., ¶ 7. Anderson also filed inmate appeal number CTF-12-00693 to appeal the
18 cancellation of inmate appeal CTF-11-02106. Lozano Decl., ¶ 8 and Ex. B. Inmate appeal
19 number CTF-12-00693 was denied at the third level of review on October 19, 2012, with a
20 determination that he had not presented any evidence to support his assertion that the appeal had
21 been cancelled inappropriately.

22
23 1. The Interview That Did Not Take Place on December 17, 2011

24 The December 17 non-interview is critical to the present motion.

25 Correctional sergeant W. Wright wrote an informational chrono (i.e., a memorandum)
26 dated December 17, 2011 in which he stated that he approached Anderson's cell "and informed
27 Anderson that Lt. Benedetti had arrived and that he was needed for an interview. The inmate
28 refused to come out of the cell. I then informed Anderson that the interview was regarding a

1 staff complaint that he had filed, he again stated that he was refusing to come out of his housing
2 to interview with Lt. Benedetti." Docket # 1-7 at 2.

3 On December 18, 2011 (i.e., the day after the interview did not take place), Anderson
4 wrote a letter to the facility captain to request that someone other than lieutenant Benedetti be
5 appointed to investigate his allegations of staff misconduct in the strip search because, in
6 Anderson's opinion, a conflict of interest existed between him and Benedetti due to her earlier
7 presiding over an unrelated disciplinary hearing. Docket # 1-9 at 2-3 (Ex. H to Complaint).
8 Anderson did not mention in that letter that he had the flu as a reason for his non-participation
9 in the interview.

10 On January 23, 2012, when he wrote his second level appeal, Anderson did not object to
11 the statement in the first level decision that he had "refused to participate in an interview"
12 conducted by lieutenant Benedetti on December 17. *See* Docket # 1-2 at 6; Docket # 1-3 at 2.

13 On March 19, 2012, five days after the inmate appeal had been cancelled, Anderson filed
14 a separate inmate appeal (i.e., CTF-12-00693) in which he urged that his inmate appeal had been
15 cancelled improperly because (a) no section in the regulation permitted cancellation of appeals
16 for refusal to interview or cooperate and (b) the second level could not reject for refusal-to-
17 interview when the first level had not rejected for that reason. Docket # 24 at 13. He did not
18 mention that he had the flu when summoned for the interview on December 17.

19 On April 5, 2012, Anderson attempted to appeal the cancellation and wrote that, despite
20 the fact that he had told lieutenant Benedetti on December 6, 2011 that "he had a problem with
21 her investigating the matter she still endeavored to interview me a 2nd time at which time I
22 simply waived the interview and thereafter expedited a formal request to remove her on the
23 predicate a conflict of interest existed." Docket # 1-2 at 6. He did not mention the flu as a
24 reason why he was not interviewed on December 17, 2011.

25 On April 13, 2012, Anderson wrote an inmate appeal in which he urged that he had
26 "waived the interview" and suggested that only one face-to-face interview was needed. Docket
27 # 24 at 35.

28 Anderson's first written mention of the flu occurred on August 13, 2012, in the third level

1 appeal of CTF-12-00693, when he wrote that he told sergeant Wright that he "waived the second
2 interview" because he was "experiencing flu symptoms and not feeling well therefrom." Docket
3 # 24 at 14; *see also* Docket # 1-1 at 7-8 (verified complaint stating that he had the flu and told
4 Wright "he was not feeling well and to tell Lt. Benedetti that he waived the interview with her").

5 Anderson did not seek or receive any treatment for the flu. *See* Docket 37-1 at 5. He
6 also was well enough to attend the committee hearing on December 15, to write a letter
7 protesting Benedetti on December 18, and to write an inmate appeal on December 22, 2011.
8 *See* Docket # 1-5 at 2; Docket # 1-9 at 2; Docket # 1-9 at 7.

9 At his deposition, Anderson articulated a new reason he didn't want to leave his cell: "I
10 didn't want to get up and be chained up, because in the hole, you have to put on chains and all
11 that. I didn't even want to be bothered with all that." Docket # 37-1 at 5. And in his opposition
12 to defendants' motion, he argued for the first time that he had requested that the interview be
13 rescheduled, *see* Docket # 34 at 15, but that is inconsistent with his evidence that he asked to
14 "waive" the interview.

DISCUSSION

A. Motion for Summary Judgment

1. Conversion of The Motion To Dismiss To A Motion For Summary Judgment

19 Until recently, the affirmative defense of non-exhaustion of administrative remedies had
20 to be raised in an unenumerated Rule 12(b) motion under the then-controlling precedent of *Wyatt*
21 *v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). *Wyatt* was overruled by *Albino v. Baca*, 747
22 F.3d 1162, 1169 (9th Cir. 2014), earlier this year. *Albino* discarded the unenumerated Rule 12(b)
23 motion procedure and held that non-exhaustion had to be raised by a motion for summary
24 judgment. *Albino*, 747 F.3d at 1168.

25 Defendants had filed an unenumerated Rule 12(b) motion to dismiss for non-exhaustion
26 at a time when *Wyatt* dictated that procedure. After the motion was fully briefed, *Albino* was
27 decided. The parties then stipulated to convert the unenumerated Rule 12(b) motion to a Rule
28 56 motion for summary judgment. Docket # 43. On the day they filed the stipulation,

1 defendants filed and served a *Rand* notice regarding the procedures for and significance of a
2 summary judgment motion. Anderson had been released from custody before defendants filed
3 their motion to dismiss that was later converted to a motion for summary judgment.

4 The threshold question is whether there was a notice problem for the motion. Due to his
5 non-prisoner status at the time the motion was filed, Anderson was not entitled to the *Rand*
6 notice regarding summary judgment because the *Rand* notice requirement has not been extended
7 to non-prisoner *pro se* litigants. *See Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir. 1998) (en
8 banc); *Jacobsen v. Riller*, 790 F.2d 1362, 1364-65 & n.4 (9th Cir. 1986). Anderson also
9 stipulated to the conversion of the motion to dismiss into a motion for summary judgment.
10 Further, the order of service provided notice to Anderson about both the enumerated Rule 12(b)
11 motion procedure as well as the motion for summary judgment procedure, and informed
12 Anderson that his case would be dismissed and no trial would occur if either was granted.
13 Docket # 6 at 9-10. For these reasons, it is permissible to consider the motion for summary
14 judgment that started out life as a Rule 12(b) motion to dismiss.

15

16 2. Legal Standard for Summary Judgment

17 The court will grant summary judgment "against a party who fails to make a showing
18 sufficient to establish the existence of an element essential to that party's case, and on which that
19 party will bear the burden of proof at trial . . . since a complete failure of proof concerning an
20 essential element of the nonmoving party's case necessarily renders all other facts immaterial."
21 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also Anderson v. Liberty Lobby, Inc.*,
22 477 U.S. 242, 248 (1986) (a fact is material if it might affect the outcome of the suit under
23 governing law, and a dispute about a material fact is genuine "if the evidence is such that a
24 reasonable jury could return a verdict for the nonmoving party").

25 Generally, when defendants move for summary judgment on an affirmative defense on
26 which they bear the burden of proof at trial, they must come forward with evidence which would
27 entitle them to a directed verdict if the evidence went uncontested at trial. *See Houghton v.*
28 *South*, 965 F.2d 1532, 1536 (9th Cir. 1992). The failure to exhaust administrative remedies is

1 an affirmative defense that must now be raised in a motion for summary judgment. *See Albino*,
2 747 F.3d at 1166. On a motion for summary judgment for non-exhaustion, the defendants have
3 the initial burden to prove "that there was an available administrative remedy, and that the
4 prisoner did not exhaust that available remedy." *Id.* at 1172. If defendants carry that burden,
5 the prisoner has the burden of production. "That is, the burden shifts to the prisoner to come
6 forward with evidence showing that there is something in his particular case that made the
7 existing and generally available administrative remedies effectively unavailable to him." *Id.*
8 The ultimate burden of proof remains with defendants, however. *Id.* "If material facts are
9 disputed, summary judgment should be denied, and the district judge rather than a jury should
10 determine the facts." *Id.* at 1166.

11 A verified complaint may be used as an opposing affidavit under Federal Rule of Civil
12 Procedure 56, as long as it is based on personal knowledge and sets forth specific facts
13 admissible in evidence. *See Schroeder v. McDonald*, 55 F.3d 454, 460 & nn. 10-11 (9th Cir.
14 1995). Anderson's complaint is verified and therefore may be considered as evidence.

15 The court's function on a summary judgment motion is not to make credibility
16 determinations or weigh conflicting evidence on a disputed material fact. *See T.W. Elec. Serv.*
17 *Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must
18 be viewed in the light most favorable to the nonmoving party, and the inferences to be drawn
19 from the facts must be viewed in a light most favorable to the nonmoving party. *See id.* at 631.
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21 3. Administrative Remedies Were Not Exhausted As To The Strip Search

22 "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983],
23 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility
24 until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
25 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Porter v. Nussle*, 534 U.S.
26 516, 524 (2002). All available remedies must be exhausted; those remedies "need not meet
27 federal standards, nor must they be 'plain, speedy, and effective.'" *Id.* (citation omitted). Even
28 when the prisoner seeks relief not available in grievance proceedings, notably money damages,

1 exhaustion is a prerequisite to suit. *Id.*; *Booth v. Churner*, 532 U.S. 731, 741 (2001).

2 The State of California provides its inmates and parolees the right to appeal
3 administratively "any policy, decision, action, condition, or omission by the department or its
4 staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or
5 her health, safety, or welfare." Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available
6 administrative remedies within this system, a prisoner must proceed through three formal levels
7 of appeal and receive a decision from the Secretary of the California Department of Corrections
8 and Rehabilitation or his designee. *Id.* § 3084.1(b), § 3084.7(d)(3); *see Woodford v. Ngo*, 548
9 U.S. 81, 85-86 (2006).

10 An inmate appeal may be cancelled if the inmate "refuses to be interviewed or to
11 cooperate with the reviewer." Cal. Code Regs. tit. 15, § 3084.6(c)(8). A cancellation decision
12 does not exhaust administrative remedies. *Id.* § 3084.1(b). An inmate can appeal that
13 cancellation decision separately by appealing the application of § 3084.6(c) to his appeal; if he
14 prevails on that separate appeal, the cancelled appeal later can be considered at the discretion
15 of the appeals coordinator or the third level appeals chief. *Id.* § 3084.6(a)(3) and § 3084.6(e).²

16 Although Anderson is now out of custody, the exhaustion requirement in § 1997e(a)
17 applies because he was a prisoner at the time he filed this action, and the statute plainly requires
18 exhaustion by a "prisoner." Anderson's release from custody after he filed this action does not
19 excuse the need to exhaust before filing this action. *Cox v. Mayer*, 332 F.3d 422, 424-28 (6th
20 Cir. 2003); *Seward v. Persson*, 2014 WL 494879, *2 (D. Or. 2014) ("the PLRA exhaustion
21 requirement is applicable to all persons who are incarcerated at the time they file their civil
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24 ²Defendants and Anderson erroneously argue that the regulations were changed with
25 regard to cancellation of appeals, and then dispute whether the allegedly amended regulations
26 should apply. The most recent amendments to the three cited regulations – 15 Cal. Code Regs.
27 §§ 3084.3, 3084.4, and 3084.6 – occurred more than ten months before the strip search.
28 Specifically, these three sections were amended in 1997, and again in 2010 (with the 2010
See 15 Cal. Code Regs. § 3084.3 (history notes 6-10); § 3084.4 (history notes 4-8), § 3084.6
(history notes 4-8). Anderson had the current version of the relevant regulations while he was
engaged in the inmate appeal process, as can be determined from his March 19, 2012 inmate
appeal citing § 3084.6(e) – a subsection that did not exist until the 2010 amendments.
See Docket # 1-13 at 5.

1 actions even if they were released from custody prior to resolution of their claims"); *cf.*
2 *Talamantes v. Leyva*, 575 F.3d 1021, 1023-24 (9th Cir. 2009) (plaintiff who had been released
3 from custody a year before he filed the action was not required to comply with the exhaustion
4 requirement). A plaintiff who was in prison and had not exhausted by the time he filed the
5 action, but was later released from prison, can file a new action and thereby avoid the exhaustion
6 requirement because it only applies to prisoners. *See Kaba v. Stepp*, 458 F.3d 678, 680 (7th Cir.
7 2006); *Cox*, 332 F.3d at 426-27.

8 Defendants carry their burden to demonstrate that there were available administrative
9 remedies for Anderson, and that Anderson did not exhaust those available remedies. The
10 undisputed evidence shows that California provides an administrative remedies system for
11 California prisoners to complain about their conditions, that Anderson had used that California
12 inmate appeal system many times in the past, and that Anderson used it to complain about the
13 strip search. Defendants also present undisputed evidence that Anderson did not receive the
14 necessary third level decision on his inmate appeal because it was cancelled at the second level
15 due to Anderson's failure to interview on December 17, 2011. And defendants show that a state
16 regulation, i.e., § 3084.6(c)(8), allowed prison officials to cancel an inmate appeal due to an
17 inmate's refusal to interview, even when that refusal occurred during a lower level review in the
18 inmate appeal process. Defendants further show that, under § 3084.1(b), the inmate appeal
19 cancelled at the second level did not suffice to exhaust administrative remedies.

20 Once defendants meet their initial burden, the burden shifts to Anderson to come forward
21 with evidence showing that something in his particular case made the existing administrative
22 remedies effectively unavailable to him. *See Albino*, 747 F.3d at 1172. Anderson tries to meet
23 that burden by attacking the cancellation of his inmate appeal. The propriety of the cancellation
24 matters because, if prison officials improperly screened out or cancelled his appeal, he could not
25 properly complete the grievance process and administrative remedies would be effectively
26 unavailable. *See Sapp v. Kimbrell*, 623 F.3d 813, 822-23 (9th Cir. 2010). To satisfy this
27 exception to exhaustion, the prisoner must show: "(1) that he actually filed a grievance or
28 grievances that, if pursued through all levels of administrative appeals, would have sufficed to

1 exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened
2 his grievance or grievances for reasons inconsistent with or unsupported by applicable
3 regulations." *Id.* at 823-24.

4 Anderson does not meet his burden to show that administrative remedies were effectively
5 unavailable. No reasonable trier of fact could find that prison officials cancelled Anderson's
6 inmate appeal for reasons inconsistent with or unsupported by applicable regulations. The
7 regulation plainly allows an inmate appeal to be cancelled for refusal to interview, and does not
8 provide an exception to that rule for an inmate who does not feel well. Anderson urges that his
9 failure to be interviewed on December 17 was due to him having the flu. Anderson's argument
10 that he had the flu borders on the non-credible as he waited so long to mention the flu as an
11 excuse in his writings to prison officials about the refusal to interview and instead focused on
12 a conflict of interest he claimed to have with lieutenant Benedetti and on his alleged right to be
13 interviewed only once.³ Nonetheless, the court will assume for purposes of deciding the
14 summary judgment motion that Anderson actually had the flu and mentioned it to sergeant
15 Wright as the reason he declined to be interviewed. Even accepting that he had the flu and told
16 Wright of it, there is no evidence that Anderson requested that the interview be rescheduled
17 instead of cancelled; to the contrary, his evidence is that he told Wright he had the flu and
18 therefore "waived" the interview with lieutenant Benedetti. The regulations do not give an
19 inmate an option to "waive" an interview; regardless of whether he calls it a refusal or a waiver
20 or something else, it amounted to a refusal to be interviewed that could result in a cancellation
21 of the inmate appeal. The cancellation of his inmate appeal at the second level due to Anderson's
22 refusal to be interviewed was "clearly articulated in the cancellation notice," as required by §
23 3084.6(c)(8)(A). The cancellation of his inmate appeal was not improper, and the subsequent
24 screening out of the appeal at the third level based on the earlier cancellation was not improper.
25

26 _____
27 ³Anderson did not mention the flu he supposedly had on December 17 in his December
28 18, 2011 letter, or in his inmate appeals written on January 23, March 19, April 5, or April 13,
2012. The flu was first mentioned in a writing dated August 13, 2012. Anderson also did not
seek treatment for the flu. And he was well enough to attend a committee hearing the day
before, and to write a letter the day after, prison officials tried to interview him.

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Anderson argues that the § 3084.7(e) did not require multiple interviews. True, but it also did not prohibit multiple interviews. *See* Cal. Code Regs. § 3084.7(e) ("At least one face-to-face interview shall be conducted . . . "). Prison officials were not in violation of the regulations by requiring a second interview of Anderson by the investigator reviewing his staff complaint. Not only were multiple interviews generally permitted, the record suggests a specific need for one here. Anderson's inmate appeal had leveled a very serious charge as he had alleged that a correctional officer had sexually assaulted him. Also, even by his own account, Anderson provided little information in the first interview: when Benedetti asked about the incident, Anderson directed her to his staff complaint and did not further explain what happened or provide names of witnesses. *See* Docket # 1-13 at 6. The fact that two other prison officials had interviewed him before and after he filed his inmate appeal did not make multiple interviews by the assigned investigator improper.

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Anderson appealed the cancellation of his original inmate appeal and received a third level denial of the appeal of the cancellation decision. That third level denial of appeal CTF-12-00693 did not suffice to exhaust administrative remedies for the strip search incident that was the subject of the cancelled appeal CTF-11-02106. Also, the denial of his appeal of the cancellation decision cannot be attributed just to sergeant Wright not writing on the informational chrono that Anderson had the flu, as Anderson failed to mention the flu as an excuse in his first level appeal or his second level appeal in CTF-12-00693. The third level denial of the cancellation appeal did not render administrative remedies unavailable to Anderson. or suffice to exhaust administrative remedies regarding the strip search. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Ngo*, 548 U.S. at 90-91.

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Bearing in mind that defendants have the ultimate burden of proof on the defense and viewing the evidence in the light most favorable to Anderson, the court concludes that defendants are entitled to judgment as a matter of law on the affirmative defense that Anderson

1 failed to exhaust administrative remedies on the strip search claims. The claims based on the
2 strip search incident therefore are dismissed without prejudice to Anderson filing a new action
3 alleging those claims. The court expresses no opinion about whether such claims would be
4 timely under the applicable statutes of limitations.

5

6 B. Motion To Dismiss

7 Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move to dismiss on the
8 ground that there is a "failure to state a claim upon which relief may be granted." A motion to
9 dismiss should be granted if plaintiff fails to proffer "enough facts to state a claim to relief that
10 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating
11 *Conley v. Gibson*, 355 U.S. 41 (1957)). The court "must accept as true all of the factual
12 allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and must
13 construe *pro se* pleadings liberally, *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010). The
14 court need not accept as true allegations that are legal conclusions, unwarranted deductions of
15 fact or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988,
16 amended by 275 F.3d 1187 (9th Cir. 2001). In considering a motion to dismiss, the court may
17 take judicial notice of matters of public record outside the pleadings. *See MGIC Indem. Corp.*
18 *v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

19

20 1. Due Process Claims

21 Defendants contend in their Rule 12(b)(6) motion that the complaint fails to state a due
22 process claim based on Anderson's placement and retention in ad-seg because (a) he failed to
23 allege that an interest of real substance was implicated and (2) he received the procedural
24 protections he was due.

25 The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution protects
26 individuals against governmental deprivations of life, liberty or property without due process of
27 law. Interests that are procedurally protected by the Due Process Clause may arise from two
28 sources: the Due Process Clause itself and laws of the states. *See Meachum v. Fano*, 427 U.S.

1 215, 223-27 (1976). In the prison context, these interests are generally ones pertaining to liberty.
2 Changes in conditions so severe as to affect the sentence imposed in an unexpected manner
3 implicate the Due Process Clause itself, whether or not they are authorized by state law. *See*
4 *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (citing *Vitek v. Jones*, 445 U.S. 480, 493 (1980)
5 (transfer to mental hospital), and *Washington v. Harper*, 494 U.S. 210, 221-22 (1990)
6 (involuntary administration of psychotropic drugs)). Deprivations that are less severe or more
7 closely related to the expected terms of confinement may also amount to deprivations of a
8 procedurally protected liberty interest, provided that the liberty in question is one of "real
9 substance." *See Sandin*, 515 U.S. at 477-87. An interest of "real substance" will generally be
10 limited to freedom from restraint that imposes an "atypical and significant hardship on the
11 inmate in relation to the ordinary incidents of prison life" or "will inevitably affect the duration
12 of [a] sentence." *Id.* at 484, 487.

13 When prison officials initially determine whether a prisoner is to be segregated for
14 administrative reasons and a liberty interest of real substance is implicated, due process requires
15 that there be an evidentiary basis for the prison officials' decision. *Superintendent v. Hill*, 472
16 U.S. 445, 455 (1985); *Toussaint v. McCarthy*, 801 F.2d 1080, 1104-05 (9th Cir. 1986).⁴ This
17 standard is met if there is "some evidence" from which the conclusion of the administrative
18 tribunal could be deduced. *Superintendent v. Hill*, 472 U.S. at 455; *Toussaint*, 801 F.2d at 1105.
19 Following placement in administrative segregation, prison officials must engage in some sort
20 of periodic review of the inmate's confinement. *See Hewitt v. Helms*, 459 U.S. 460, 477 n.9
21 (1983).

22 Anderson's complaint fails to state a claim for a due process violation based on his
23 placement and retention in ad-seg. First, the complaint is deficient in that Anderson does not
24 allege facts showing that an interest of real substance was implicated by his placement and
25

26
27 ⁴Due process also requires that prison officials hold an informal nonadversary hearing
28 within a reasonable time after the prisoner is segregated, inform the prisoner of the charges
against him or the reasons segregation is being considered, and allow the prisoner to present his
views. *Toussaint*, 801 F.2d at 1100. Neither Anderson nor defendants suggest these other
procedural protections are at issue in this case.

1 retention in ad-seg. He does not describe any conditions that existed for ad-seg prisoners that
2 showed them to be an "atypical and significant hardship" compared to the ordinary incidents of
3 prison life. *Sandin*, 515 U.S. at 484. Mere placement in ad-seg is not an atypical and significant
4 hardship if the conditions there are essentially the same as general population conditions.
5 Anderson also does not allege any facts showing that the placement in ad-seg would inevitably
6 affect the duration of his sentence. In his amended complaint, Anderson must allege facts
7 showing that the conditions of ad-seg were such that his placement and retention there
8 implicated a liberty interest of real substance.

9 Second, the complaint does not adequately allege that there was not sufficient evidence
10 to support the initial decision to place Anderson in ad-seg. Anderson's allegations and the CDC-
11 114 ad-seg placement notice form attached to his complaint show that he had made a very
12 serious allegation of excessive force and sexual assault by a staff member and was initially
13 placed in ad-seg because of the pending formal investigation into his allegations. *See* Docket
14 # 1-1 at 6-7; Docket # 1-4 at 2. Anderson's characterization of the strip search incident as a
15 sexual assault likely caused it to be taken far more seriously than would have been the case if
16 the prison guard had, for example, yanked something out of Anderson's hand and scratched his
17 wrist in doing so. The more serious consideration was consistent with prison officials' legal
18 obligations regarding sexual abuse in prison facilities. *See* Cal. Penal Code §§ 2635-2643; Cal.
19 Code Regs. tit. 15, § 3401.5; CDCR Operations Manual, Article 44 ("Prison Rape Elimination
20 Policy"). Anderson argues that the placement was unsupported because "staff had not received
21 any confidential data indicating that plaintiff or the involved staff members' safety or
22 institutional security had been threatened to justify his placement in administrative segregation."
23 Docket # 34 at 7 (errors in source); *see also* Docket # 1-1 at 7.⁵ Prison officials need not wait
24

25
26 ⁵Anderson also argues that the sequence of events shows that his placement was a due
27 process violation. Specifically, he argues that, since his ad-seg placement did not occur until
28 December 5, several days after the December 1 search, and followed his December 3 written
inmate appeal rather than his earlier oral complaints that started on the day of the strip search,
his placement in ad-seg was improper and violated due process. These allegations do not show
a due process violation or suggest the absence of some evidence to support his placement in ad-
seg during the investigation.

1 for a specific threat to be made, an act of violence to be committed, or an investigation to be
2 interfered with before they may place someone in administrative segregation. Section 3335(a)
3 of the regulations and existing cases recognize the propriety of using ad-seg placement as a
4 prophylactic measure and the importance of deferring to prison officials' judgment on such
5 placements. Anderson's placement in ad-seg was the type of placement contemplated in *Hewitt*
6 *v. Helms*, 459 U.S. at 473-74, where the Court recognized the occasional need to segregate
7 inmates during investigations in prison and recognized that numerous factors may inform prison
8 officials' determinations as to the severity of a security threat. "In the volatile atmosphere of a
9 prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners
10 and guards *even if he himself has committed no misconduct*; rumor, reputation, and even more
11 imponderable factors may suffice to spark potentially disastrous incidents. The judgment of
12 prison officials in this context, like that of those making parole decisions, turns largely on 'purely
13 subjective evaluations and on predictions of future behavior.'" *Id.* at 474 (emphasis added); *see also*
14 *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to
15 the professional judgment of prison administrators, who bear a significant responsibility for
16 defining the legitimate goals of a corrections system and for determining the most appropriate
17 means to accomplish them."); *Griffin v. Gomez*, 741 F.3d 10, 21 (9th Cir. 2014) ("federal courts
18 should exercise restraint when reviewing management decisions taken by prison administrators
19 to secure the safety of prisoners and state prison personnel").

20 The preceding paragraph has discussed Anderson's initial placement in ad-seg but not his
21 retention in ad-seg because the facts are somewhat different. The complaint pleads facts – i.e.,
22 that Anderson filed a staff misconduct complaint that caused an investigation to be started and
23 prompted his placement in ad-seg during the investigation – that are incompatible with a claim
24 that there was not some evidence to support the initial decision to place him in ad-seg. However,
25 the complaint does not plead facts incompatible with a claim that there was not some evidence
26 to support his continued retention in ad-seg after the investigation into his staff misconduct
27 allegations concluded. Defendants state that the reason for Anderson's continued retention in
28 ad-seg can be found in the program review document from February 9, 2012. *See* Docket # 1-15

1 at 2. Although the document is attached to the complaint, Anderson does not adopt it or allege
2 facts showing it to be true. *See Northern Indiana Gun & Outdoor Shows, Inc. v. City of South*
3 *Bend*, 163 F.3d 449, 455 (7th Cir. 1998) (declining to apply blanket rule that document attached
4 is adopted *in toto* "in the case of letters written by the opposition for what could be self-serving
5 purposes"). On this Rule 12(b)(6) challenge to the pleading, the document does not help
6 defendants to show that a due process claim is not stated. (Of course, the document can be
7 considered if the case reaches the summary judgment stage because the court can go beyond the
8 pleadings at that stage.) Notwithstanding the adequacy of the insufficient-evidence portion of
9 the due process claim regarding his retention in ad-seg, Anderson is cautioned that he must
10 allege that element again in his amended complaint *and* must allege facts showing that his
11 retention implicated an interest of real substance to state a due process claim.

12

13 2. Retaliation

14 The complaint asserts two different retaliation claims. In the first retaliation claim,
15 Anderson alleges that lieutenant Mendez put him into ad-seg in retaliation for Anderson's
16 complaint about the strip search and that Benedetti and Spearman approved the decision. In a
17 separate retaliation claim, Anderson alleges that defendant Spearman caused him (Anderson) to
18 be recommended for transfer to Pleasant Valley State Prison, apparently to retaliate for Anderson
19 filing a civil rights complaint against Spearman and others in 2009 and/or for Anderson filing
20 an administrative appeal about his placement in ad-seg after the strip search.

21

22 Defendants contend that the retaliation claims are deficient because Anderson does not
23 allege the necessary element that defendants' actions "did not reasonably advance a legitimate
24 correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).⁶ They argue that
25 Anderson fails to allege facts indicating that the decision to place Anderson in ad-seg did not

26 ⁶"Within the prison context, a viable claim of First Amendment retaliation entails five
27 basic elements: (1) An assertion that a state actor took some adverse action against an inmate
28 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
exercise of his First Amendment rights, and (5) the action did not reasonably advance a
legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
(footnote omitted).

1 reasonably advance legitimate penological goals. They also argue that Anderson has not alleged
2 any facts indicating that there were no legitimate penological goals for the transfer.

3 The complaint fails to state a claim for retaliation with regard to Anderson's placement
4 in ad-seg because Anderson has not alleged facts showing the absence of a legitimate
5 penological purpose for the decision. As explained in the due process analysis above, Anderson
6 pleads facts and attaches documentation showing the existence of a legitimate penological
7 purpose for his placement in ad-seg. Anderson had filed a serious staff misconduct complaint
8 and was placed in ad-seg during its investigation. *See* Docket # 1-4 at 2 (CDC-114 listing reason
9 for ad-seg placement as "jeopardized integrity of an investigation of alleged serious misconduct
10 or criminal activity.") That kind of prophylactic placement in ad-seg serves a legitimate
11 penological goal, as recognized in the regulations, Cal. Code. Regs. tit. 15, § 3335(a), and cases,
12 *see, e.g., Hewitt v. Helms*, 459 U.S. at 473-74. Anderson makes much of the fact that the ad-seg
13 placement did not occur until he followed up his oral complaint with a written staff complaint
14 (*see* footnote 5, above), but that does not show the placement to be devoid of a legitimate
15 penological purpose.

16 The complaint fails to state a claim for retaliation with regard to Spearman causing him
17 to be recommended for a transfer because it does not allege the absence of a legitimate
18 penological goal for Spearman's actions. Anderson alleges that Spearman recommended his
19 transfer to Pleasant Valley State Prison "based solely on a self-serving belief that staff members
20 safety would be compromised if plaintiff were/was returned to general population at CTF-
21 Central." Docket # 1-1 at 15. That allegation shows the presence of a legitimate penological
22 goal rather than the absence of one. Even if Spearman was incorrect, if Spearman actually
23 believed that staff members' safety would be compromised if Anderson returned to the general
24 population, his transfer recommendation would have been for a legitimate penological purpose
25 of protecting staff rather than for retaliatory purposes. *Cf. Wood v. Beauclair*, 692 F.3d 1041,
26 1051 (9th Cir. 2012) (rejecting retaliatory transfer claim because transfer of prisoner to another
27 prison to distance him from two female officers who were fraternizing with him contrary to
28 prison policy reasonably advanced a legitimate correctional goal).

1 3. State Law Claims

2 Defendants argue that Anderson's state law claims should be dismissed because he fails
3 to allege compliance with the claim presentation requirement of the California Government
4 Claims Act, which requires presentation of the claim to the California Victim Compensation and
5 Government Claims Board ("Board"). *See* Cal. Gov't Code §§ 905.2, 911.2, 945.4, 950.2.
6 Anderson had to present his personal injury tort claim against a state employee or entity to the
7 Board within six months of the accrual of the cause of action, and had to present any claim
8 relating to any other cause of action within a year after the accrual of the cause of action.
9 *See* Cal. Gov't Code § 911.2. Timely claim presentation is "a condition precedent to plaintiff's
10 maintaining an action against [a state employee or entity] defendant." *California v. Superior
Court (Bodde)*, 32 Cal. 4th 1234, 1240 (Cal. 2004). The failure to include the necessary
11 allegations about claim presentation makes the complaint subject to attack for failure to state a
12 cause of action. *Id.*

14 Anderson argues that the wrongful cancellation of his inmate appeal excused his non-
15 compliance with his obligation to present a claim to the Board. This argument is unpersuasive.
16 "[T]he prison's inmate appeals process and the Government Claims Act process are separate
17 processes and there is no support for a finding that the allegedly improper cancellation of
18 Plaintiff's inmate appeal had any effect whatsoever on his ability to timely present his
19 Government Claims Act claim." *Martinez v. Tilton*, 2013 WL 5670869, *3 (E. D. Cal. 2013);
20 *see also Parthemore v. Col*, 221 Cal. App. 4th 1372, 1376 (Cal. Ct. App. 2013) (California
21 courts emphasize that a "[p]laintiff's obligation to exhaust the administrative remedies available
22 to prisoners . . . is independent of the obligation to comply with the Government Claims Act.").
23 Further, as explained earlier, the cancellation of Anderson's inmate appeal was not improper.⁷
24 The state law claims are dismissed.

25 Anderson does not actually concede that he did not present the claims to the Board. If

27 ⁷If the cancellation of the inmate appeal did excuse Anderson's non-compliance with
28 California's Government Claims Act, it would only do so with regard to the strip search because
that was the subject of the cancelled appeal.

1 he did present his claims to the Board, he may repeat his state law claims in his amended
2 complaint, but only if he also pleads that he has exhausted state court remedies for them.

3

4 || 3. Request For Injunctive Relief

5 The parties agree that the injunctive relief requests have been made moot by Anderson's
6 release from prison. Accordingly, the injunctive relief requests are dismissed.

7

8 || C. Scheduling

9 Anderson has been released from custody and now resides in San Bernardino, California.
10 It is not clear whether he is on parole and, if so, whether that affects his ability to travel. The
11 court wants this information for scheduling purposes in the event this case progresses beyond
12 the pleading stage. Anderson must provide the following information to the court no later than
13 **August 15, 2014:** (1) if Anderson is not on parole, he should so inform the court; and (2) if
14 Anderson is on parole, he should check with his parole agent to learn whether he needs a court
15 order to travel to San Francisco for any trial or settlement conference that might occur in this
16 case, and then provide that information to the court.

17 Anderson also is informed that he will need to make his own travel arrangements and pay
18 for his own travel and lodging for any trial or settlement conference. Any trial and settlement
19 conference in this case would be held in San Francisco. The court does not pay for litigants'
20 travel expenses, even where the litigant is indigent, because the expenditure of public funds on
21 behalf of an indigent litigant is proper only when authorized by Congress. *See United States v.*
22 *MacCollom*, 426 U.S. 317, 321 (1976); *Tedder v. Odel*, 890 F.2d 210, 211 (9th Cir. 1989).

23

CONCLUSION

25 For the foregoing reasons, defendants' motion for summary judgment and to dismiss is
26 GRANTED. (Docket # 22, # 28.)

27 Defendants are entitled to judgment as a matter of law on the affirmative defense that
28 Anderson failed to exhaust administrative remedies for his claims regarding the strip search

1 before filing this action. The claims pertaining to the strip search are dismissed without
2 prejudice to him filing a new action.

3 The complaint is dismissed for failure to state a claim for the reasons discussed in this
4 order. As discussed in this order, there are some pleading problems and possibly some
5 insurmountable obstacles to Anderson's due process, retaliation and state law claims. However,
6 as it cannot be said with complete certainty that Anderson cannot cure the problems discussed
7 in this order, leave to amend the due process, retaliation and state law claims is granted. In his
8 amended complaint, plaintiff should not allege his strip search claims.

9 Anderson must file an amended complaint no later than **August 15, 2014**, and must
10 include the caption and civil case number used in this order and the words AMENDED
11 COMPLAINT on the first page. Anderson is cautioned that his amended complaint must be a
12 complete statement of his claims. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir.
13 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not
14 require that they be replied in a subsequent amended complaint to preserve them for appeal. But
15 for any claims voluntarily dismissed, we will consider those claims to be waived if not replied.").
16 Failure to file the amended complaint by the deadline will result in the dismissal of the action.

17 IT IS SO ORDERED.

18 Dated: July 21, 2014


19 SUSAN ILLSTON
20 United States District Judge

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